NASUCA
NATIONAL ASSOCIATION
OF STATE UTILITY
CONSUMER ADVOCATES

November 14, 2003

Marlene H. Dortch,
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147: **Reply to Opposition to Petition for Reconsideration**

Dear Ms. Dortch:

On October 2, 2003, the National Association of State Utility Consumer Advocates ("NASUCA"[1]) filed, pursuant to 47 C.F.R. 1.429, a Petition for Reconsideration of the *Triennial Review Order*.[2] NASUCA's Petition for Reconsideration asserted that, having made a national finding based on the record before it that competitors are impaired without access to incumbent local exchange carrier ("ILEC") unbundled local switching for the mass market, the FCC lacked authority to require the state to conduct proceedings in order to contradict that national finding. The FCC also lacked authority to require states to cure that impairment. Further, the Petition

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[1] NASUCA is an association of 44 consumer advocates in 42 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. See. e.g., Ohio Rev. Code Chapter 4911.

[2] *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) ("*Triennial Review Order*"). The *Triennial Review Order* was published in the Federal Register on September 2, 2003, at 68 Fed. Reg. 52775-52306.

for Reconsideration asserted that, having consistently found that the "impairment" standard was a lower standard than the "necessary" standard, the FCC lacked a basis to adopt an impairment standard that is indistinguishable from the unchallenged necessary standard.

Only one of the many parties to this proceeding, the Verizon Telephone Companies ("Verizon"), filed in opposition to NASUCA's Petition. In the two paragraphs of Verizon's filing that oppose NASUCA's Petition,[3] Verizon does not question NASUCA's assertions that having made a national finding of impairment for unbundled local switching for the mass market, the Commission went too far in attempting to cure the finding; instead Verizon attacks the Commission for having made that national finding.[4] The Commission's national finding will be the subject of review on appeal and is not the subject of this Reply.[5]

Verizon describes NASUCA's challenge to the Commission's requirement that states contradict the national finding, and cure impairment when it is found, as an "invitation to compound its error by doing more to preserve the switching UNE than it has already done."[6] Verizon's fear of unbundling apparently cannot distinguish between attempts to preserve the switching UNE for the mass market and the active directions to eradicate the UNE that are contained in the *Triennial Review Order*. The Commission's duty was to determine where there was impairment – which is the subject of Verizon's attacks – not to eliminate impairment where found.

NASUCA's Petition for Reconsideration should be granted.[7]

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[3] Verizon also – at much greater length – seeks denial of petitions for reconsideration files by AT&T Wireless, T-Mobile, NexTel, the Cellular Telecommunications and Internet Association, and EarthLink. Verizon's pleading also supports the petitions for reconsideration filed by BellSouth, SureWest and the United States Internet Industry Association. The Commission's rules only provide for oppositions to petitions for reconsideration, not for pleadings in support. 47 C.F.R. 1.429().

[4] See Verizon at 53 ("the problem is that the Commission ignored record evidence in order to concoct a national 'finding' of impairment in switching that preserves UNE-P indefinitely, then delegated control over the continued existence of UNE-P to the state commissions, which are even more committed to preserving UNE-P than the Commission itself.")

[5] See *Triennial Review Order*, ¶¶ . The Commission will have to defend its findings at the D.C. Circuit Court of Appeals in many of the pending appeals of the *Triennial Review Order*.

[6] Verizon at 54.

[7] Verizon does not mention NASUCA's argument that the standard for impairment adopted in the *Triennial Review Order* was unreasonably close to the long-standing higher "necessary" standard for unbundling of ILEC proprietary network elements.

Sincerely,

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